Supreme Court, U.S.
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NO. (1)

IN THE

SUPREME COURT OF THE UNITED STATES

YAAKOV KANOVSKY,

PETITIONER

----v.----

MONTEFIORE MEDICAL CENTER
and FRANK VEITH, M.D.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT APPELLLATE DIVISION SECOND DEPARTMENT NEW YORK

YAAKOV KANOVSKY
1138 52nd Street
Brooklyn, New York 11219
(718) 435-2847

Petitioner Pro Se

QUESTIONS PRESENTED

Were Plaintiff's constitutional rights to substantive and procedural due process mandated under the Fifth (5th) and Fourteenth (14th) Amendments of our Constitution disregarded by the lower court and compounded at the appeals process in the Appellate Division, Second Judicial Department, by its extraordinarily inadequate review of the laws and issues set forth in the appeal?

Does any lower court have the discretionary power to ignore all laws, facts and judicial precedents as they apply to granting summary judgment where clear issues of fact presented in Plaintiff's affidavits precluded any court from granting summary judgment?

Does any lower court have the discretionary power to consider a successive summary judgment motion where clear and unequivocal judicial precedents in all courts of the State of New York prohibit such motions, except under very special circumstances, which circumstances were not present in the herein case?

Does the Appellate Division, Second Judicial Department, have the discretionary power to affirm a lower court decision, basing its

affirmation by citing two cases, where a review of those cases and an understanding of successive summary judgment (i.e. multiple summary judgment motions) showed that both those cases were not successive summary judgment motions which are prohibited in New York State, and the case at bar met every criteria for prohibited successive summary judgment motions?

Does the Appellate Division, Second Judicial Department, have the discretionary power to affirm a lower court's grant of summary judgment where genuine issues of fact were put forth by plaintiff and the law and precedents for summary judgment preclude any court from granting summary judgment?

Were either or both the lower court's decision and the Appellate Division, Second Judicial Department's decision colored in any manner by Plaintiff's status as a suspended New York Attorney?

Should an Appellate Court apply a higher level of scrutiny and careful review to decisions rendered by a Judge who has been reversed on more than one third of his decisions which were appealed, and especially

so where the judge was also indicted for criminal offenses and removed from the bench a few days after making his decision, and, thus, his erroneous decision may have been impacted by future events, such as his impending criminal trial, which event is currently unfolding?

Petitioner firmly believes that factors other than upholding New York's law resulted in two convoluted decisions and thus Petitioner was deprived of any semblance of substantive and procedural due process guaranteed by the United States Constitution.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Appellate Division, Second Department of New York denying my appeal was dated May 21, 2007 and served on June 27, 2007. (Appendix A)

A Motion for permission to Appeal said decision to New York's Court of Appeals was timely submitted to New York's Court of Appeals on July 26, 2007 and dismissed by the Court of Appeals on Oct. 16, 2007. (Appendix D)

A timely request for rehearing was submitted on November 15, 2007 and denied by the Court of Appeals in its decision dated January 10, 2008. (Appendix E)

A letter to the United States Supreme Court Clerk's Office to extend the time to submit a writ was initially sent on April 4, 2008, and a revised Letter was sent on May 2, 2008. The Court granted an extension up to and including June 6, 2008.

JURISDICTION

Jurisdiction is proper under the Fifth (5th) and Fourteenth (14th) Amendments where Plaintiff alleges that both the lower court decision and the Appellate Division's review and decision conflicted with clear New York Law and that these decisions deprived him of any semblance of substantive and procedural due process in both the lower court and in the appellate process.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution's Due Process Clause under the Fifth (5th) Amendment and incorporated into the Fourteenth (14th) Amendment guarantees citizens the right to litigate criminal and civil matters in federal and state courts under the fundamental fairness principles, which principles were totally disregarded by the lower court and by the Appellate Division's review.

STATEMENT OF THE CASE

The Basis of my Complaint

I am a bi-lateral amputee and initiated the suit against the above-named hospital and doctor based on the malpractice and negligence in the surgery on my left leg, and in the post-operative care and post-discharge care by defendants which occurred in March and April, 1997. I have suffered from Peripheral Vascular Disease (PVD) for over twenty-five years.

In January, 1997, my left leg, which had been amputated below-the-knee in April, 1995, became infected and gangrenous and would not heal. I was admitted to Montefiore on or about March 1, 1997, by Dr. Frank Veith, the vascular surgeon. Tests revealed that invasive radiology could not alleviate the gangrenous condition of the left stump and immediate surgery was ordered by Dr. Veith which included an above-the-knee amputation to arrest the gangrenous infection.

That operation, which is the basis of my Suit, was done in such a haphazard and negligent manner that not only did the stump never heal, but became further infected and,

as a result: a) the operation caused me tremendous pain and suffering for almost a year; b) necessitated my taking large doses of pain medications (Percocet and morphine); and c) caused me to lose any chance to ambulate with prostheses.

Specifically, I alleged that three major mistakes were made by defendants:

a) the skin and muscle tissues were wrapped around the bone so tightly that, in addition to causing tremendous pain and suffering, the tight wrapping caused the muscle tissue to die and the wound to become gangrenous;

b) the bone was left approximately one to two inches too long for the skin and this tightness caused intense pain to the wound area, a deterioration of the skin at the wound site and gangrene, which prevented any potential healing and caused intense pain; and

c) the above-the-knee wound was closed and shaped in a hammerhead rather than a rounded cone-like shape, rendering it impossible to have a prosthesis properly fitted.

A videotape taken in June, 1997, three months after the surgery and prior to corrective surgery by Dr. Chafiian, and submitted to Defendants, shows the shape and resulting inflamed and gangrenous condition of the stump which Dr. Veith or his staff rendered by their operating procedure.

After I was discharged from Montefiore Medical Center, I returned four times for post-discharge wound treatment in March and April, 1997. Although I continuously complained of intense pain, Dr. Veith and his staff assured me that my wound was healing and that I was imagining any pain and abruptly stopped the pain medication (R 356 - All R numbers refer to the Appellate Record on Appeal). Never did Dr. Veith ever investigate the etiology of my pain, and he admitted I complained of same in his deposition (R 173, 175-78). When Dr. Yuan, my treating physician at Dr. Veith's office, suggested that I continue wound treatment closer to home. I immediately went to see the chief vascular surgeon at Beth Israel Hospital, Dr. Steven Haveson, in April, 1997.

Dr. Haveson's first reaction when he observed the pain I was having and saw how the wound was shaped and inflamed, was to exclaim to me and my mother, "who the hell did this operation"! When I told him it was done by Dr. Frank Veith, who I later found out has written many definitive treatises on vascular surgery, he quieted his critical tone; however, I believe Dr. Haveson saw that the operation was horrendously performed.

Dr. Haveson suggested that I see Dr. Andrew Kaufman at Beth Israel's Pain Clinic where Dr. Kaufman prescribed morphine to try to alleviate the increasing pain. Even taking 12 to 15 morphine pills a day did not relieve the constant excruciating pain. Dr. Haveson suggested that he operate and cut the entire remaining stump off at the groin. I sought a second opinion because that type of revision would make it critically difficult for me to transfer, i.e., from a wheelchair to a car, to a bed, or to a shower chair, etc.

I returned to Kingsbrook Jewish Medical Center in June, 1997, and Dr. Chafiian, the Chief of Surgery at the time, suggested that he would correct the surgery done by Dr. Veith and/or his staff. On or

about June 28, 1997, I was admitted to Kingsbrook. Multiple surgeries were done in July and August, and I finally went home in mid-August, 1997, with the stump shortened by less than two inches, and with an open wound at the end of the stump which was about seven inches by four inches by an inch-and-one-half deep. During the time this deep wound was healing, I required heavy pain medication. As of the end of 1997, I have not taken any pain medication. The stump could still not be made suitable for a prosthesis due to the extensive removal of dead muscle tissue which made it impossible for the stump to be in a proper vertical position.

Post-operatively, Dr. Chafiian stated to me unequivocally that the procedure done at Montefiore was gross malpractice, and, based on my extensive temporary and permanent injuries coupled by his statements to me, my family, and subsequently to my former attorney, and by Dr. Steven Haveson's critical exclamation when he first observed the wound site, I brought this lawsuit on August 31, 1999 (R24-33). Both my mother, who was with me throughout this ordeal, and the wound-care nurse (Greg Davis) who saw me at least three times a week, are prepared to testify that my wound constantly deteriorated

and not as a result of any alleged new injury following the operation. Since Dr. Chafiian's corrective surgery in July-August of 1997, I have not suffered any deterioration to my left stump, and have been pain-free since the end of 1997. I have never been addicted to pain medication, as Doctor Veith or his cohort suggested in their affidavits, (R175 and R279) and no previous hospital records ever suggested same. At worst, this is an issue of fact for the jury to determine at trial and I have ample evidence to prove my statements.

Procedural History

On or about August 31, 1999, the Summons and Complaint were filed alleging negligence and malpractice in the operating procedure amputating my left leg above the knee and in the post-operative and post-discharge care (R 63). Defendants submitted their Answer on or about October 1, 1999 (R 65-68). Demands for Verified Bills of Particulars and Verified Bills of Particulars were exchanged in 1999 and 2000 (R 69-111).

On or about August 16, 2003, Defendants submitted their first motion for summary judgment (R 38-294). Plaintiff submitted his Affidavit in Opposition on

August 28, 2003. The Hearing in Justice Michael Garson's Chambers was held on November 5, 2003. Defendants' Motion was denied on the basis of timeliness, since it was brought more than 60 days after the Note of Issue was filed (R 23).

Defendants replaced their original attorneys Bartlett, McDonough, Bastone & Monagham with McAloon and Friedman, who immediately received a half-year adjournment to May, 2004, prior to proceeding to trial. Concurrently, I hired Gerald Orseck, Esq. of Orseck and Orseck, to represent me at trial.

A pre-trial hearing was set for May 2004. I instructed Mr. Orseck that we would need at least two weeks notice of the actual date of trial to enable a principal witness, my mother, who had come in February 1997, from Israel, prior to my hospitalization at Montefiore and who remained to care for me in the ensuing two months after I was discharged from Montefiore, to testify to many critical aspects of this matter.

In September 2004, I fired Mr. Orseck after becoming aware that he failed to attend hearings and conferences on my behalf. Once

I resumed handling my case pro- se, Defendants' Trial Attorney, Theodore

Rosensweig, stated to me that he went to Justice Garson in May 2004, after my attorney failed to appear at the jury selection date and on an ex-parte basis had Justice Garson order that the Note of Issue be dismissed. Mr. Rosensweig stated that he had a transcript of this Order, but he has never provided me with a copy of the Order or the alleged transcript and neither are in the Kings County File nor were they included in the Record on Appeal.

On February 2, 2005, Defendants submitted a second Summary Judgment Motion (R 269-282). My Cross-Motion was filed on or about March 31, 2005 (R 283-288). The Motions were to be heard by Justice Garson on April 20, 2005.

My Cross-Motion alleged that a prior Motion for Summary Judgment by Defendants' in 2003, using identical arguments was opposed by my prior Cross-Motion, (R 293) and that the Court ruled in my favor (R 23). I also noted that Defendants' failed to cite any CPLR Rule or case law which allowed them a second chance to renew said Motion; and that the issues of fact, which

automatically preclude summary judgment, were brought out in my prior Motion (R 293-302).

On April 20, 2006, I arrived for the Motion Hearing at approximately 10:40 a.m. As Justice Michael Garson's custom and practice in medical malpractice matters had been to hear motions in his chambers, I went directly to the 11th Floor and asked the security guard to speak to someone in Justice Garson's Chambers. The security guard connected me with the Justice's Secretary, Catherine Piriano. I explained that I wanted to confirm the time when we would argue the merits of our respective Motions. After giving her the Index Number, Ms. Piriano advised me that this Motion was not before Justice Garson, but was on Justice Ruditsky's 2:00 p.m. calendar instead. I suggested that she double-check this change, and she assured me that Justice Ruditsky was now assigned to all aspects of this case.[a] At approximately 11:00 a.m., I arrived outside Justice Ruditsky's Courtroom, noticed that the 2:00 p.m. Motion Calendar posted on the wall was too high for me read from my seated position in my

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[a] Justice Garson's cases were being reassigned at the time to other justices, and within a week of the April 20th date all medical malpractice cases were assigned to Justice Ruditsky.

scooter, and asked an attorney to see if my case was listed on the Calendar. He stated that it was the sixth and last case on the Motion Calendar.

At 2:00 p.m., I returned to Justice Ruditsky's Courtroom, where for 45 minutes a Foreclosure Calendar was heard. At approximately 2:45 p.m., Justice Ruditsky's Motion Calendar began. Not seeing the other side present, I immediately spoke to Justice Ruditsky's Law Secretary. She informed me that This Matter was not before Justice Ruditsky but was, in fact, before Justice Garson in his courtroom (Room 361) which was contrary to what Ms. Piriano has told me. I immediately went to Room 361 and spoke to Justice Garson's Clerk of the Court (Richard) who stated that, due to my absence, the Motion brought by Defendants to dismiss the case was granted on default and my Cross-Motion was denied. The Clerk proceeded to call Justice Garson's Chambers, confirmed my statement of what had occurred, called McAloon & Friedman, spoke to one of attorneys handling the matter, and asked if they would stipulate to set aside the default order. The attorney refused to do same.

On or about May 5, 2006, I submitted a Motion to Vacate the Default to Justice Ruditsky (Justice Garson's medical malpractice cases were all reassigned to Justice Ruditsky) and to reinstate the Note of Issue, noting that no Default should have been granted, since: a) the utter confusion in this matter, including being misdirected by Justice Garson's office staff as to where this Motion was to be heard, should have excused my absence; b) a prior Motion for summary judgment by Defendants' using identical arguments was opposed by my prior Cross-Motion, and the Court dismissed the first Summary Judgment Motion; c) Defendants' cited no CPLR Rule or case law which allowed them a second chance to renew said Motion; and, d) the issues of fact, which automatically preclude summary judgment, and were brought out in Plaintiff's prior Motion, i.e., my affidavit, and the testimony of Dr. Jonas Chafiian under Subpoena, which was in lieu of a physician's Affidavit of Merit, and his testimony specified two gross areas of malpractice, namely,

i) The closing of the amputation was termed by Dr. Chafiian as an inappropriate "compressed closure", i.e., the skin had been closed over the

muscles too tightly, which immediately caused my wound to deteriorate as well as causing me intense pain; coupled with the known medical fact that:

ii) pain after surgical amputation is unusual and the etiology of such pain must be carefully investigated. Dr. Veith's failure to investigate the cause of such post-operative pain was further gross malpractice. The failure to investigate and ameliorate the problem caused by the inappropriate compressed closure resulted in a major episode of gangrene within four to five weeks of the operation, necessitating further amputation to the left stump.

Either one of these factors precluded granting Defendants' Summary Judgment, as a matter of law.

In addition to my own affidavit and Dr. Chafiian's deposition testimony, I also submitted a detailed Affidavit of Merit from Dr. Friedland, a Podiatric Surgeon, who trained at North Detroit Hospital and assisted in many below and above-the-knee

amputations (R346-52). His in-depth review and analysis of Montefiore's own records left no question as to the negligent nature of this surgical procedure.

Justice Ruditsky issued his Decision and Order on October 8, 2006, which, although excusing my "default" in Justice Garson's Courtroom, upheld the decision granting summary judgment, but failed to address the key arguments, namely, that Defendants' Summary Judgment Motion was "prohibited" since this was Defendants' second Motion for Summary Judgment and that genuine issues of material facts precluded summary judgment as a matter of law.

A Motion for Reargument was submitted to Justice Ruditsky on January 10, 2006, and on February 8, 2006. I informed Justice Ruditsky at the Hearing of the May 8, 2006 appeal perfection deadline, and asked that a decision be rendered in late March or early April, 2006. As of May 1, 2006, no decision had been forthcoming, so I, as the Plaintiff-Appellant appealed to the Appellate Division Second Department on May 5, 2006.

The Appellate Division's Decision and Order, denying my appeal with costs, was

dated May 22, 2007. The Order and Notice of Entry of said Order was mailed by Defendants to Plaintiff-Appellant on June 27, 2007.

On July 26, 2007 I submitted a Motion to the New York Court of Appeals for permission to appeal. It was denied on November 15, 2007. My subsequent motion to reargue was denied on January 10, 2008.

REASONS FOR GRANTING THE PETITION

I will not mince words in an effort to be politically correct or diplomatic, but will state unequivocally that, based on my personal experience, the disposition of State Supreme Court cases in Kings County, New York, as well as the appellate review of decisions by the Second Judicial Department is deplorable. As a practicing attorney since March, 1990, I cannot begin to compare the paucity of judicial reasoning and erroneous decision making in Kings County in the Empire State to any other state in the union. I am fully aware that This Court is reluctant to interfere in the workings of a state's judicial system, but when the system is so rife with judicial decisions that shock the sensibilities of its citizens and rob them of

any semblance of due process, This Court, as the highest court in the land, must act to set some boundaries for proper judicial conduct. Not doing so condones the ever-present practice of patronage appointed judges not adhering to the rules of fundamental fairness.

Despite the fact that the State of New York and Kings County is saturated with excellent attorneys, the selection of Supreme Court Justices rarely includes a marked proportion of these attorneys and the lawyers who are selected include many whose sole qualification is a patronage handout from the party in power. Thus, I believe that too many of these Judges are unfamiliar with and/or deliberately choose to ignore the statutory laws and the case laws of this State. Unfortunately my case was saddled by a prime example of patronage appointed judiciary.

I am humbly asking This Court to review the case known as Yaakov Kanovsky v. Montefiore Medical Center & Frank Veith, M.D., on the grounds that I was deprived of any semblance of substantive due process as well as procedural due process in both the lower court and the Appellate Division, Second Judicial Department. This case was decided by Justice Michael Garson of Kings

County Supreme Court one week before his removal from the bench due to his indictment for felonies. This Court should also be aware that Justice Garson's prior decisions when appealed resulted in the reversal of his decision in more than one third of those cases.

Before I get into the specifics of the case at bar, I ask This Court's indulgence to read a prior case which I will outline briefly and which I prosecuted in federal court on behalf of an elderly lady which illustrates and reinforces the points made above. There are considerable more cases that I am aware of, but I limit my examples to this one just to make my point.

***Grunblatt v. UnumProvident Corp.*, 270 F.Supp.2d, 347(EDNY) (CV 01/8278) (Judge Trager) is a case I brought before the Federal District Court in 2001. It concerned a widow whose husband died in January, 1991, and who was unaware that in addition to a $200,000 term policy which she collected, he also had a whole life policy with UNUM for $50,000. When she attempted to collect the monies in the year 2000 UNUM denied its liability under statute of limitation grounds. I immediately sent a letter to UNUM stating**

that statute of limitations has no bearing here as the moment the insured dies UNUM becomes a stakeholder of the beneficiary's property interest which is not subject to any statute of limitations. In the ensuing civil action, UNUM argued that in 1997 a similar UNUM case in Nassau County, *Shaw v. Union Mutual Life Insurance Company of New York*, 91 Misc.2d 64 was dismissed on Statute of Limitation grounds. I responded by showing the Court the New York State Abandoned Property Law § 700 which states that if a New York citizen dies and no one comes forward to claim the policy benefits the insurance company is mandated after seven years to send the policy benefits with interest to the New York State Comptroller's Bureau of Unclaimed Funds. Thus, by legislative law New York does not recognize any statute of limitation for life insurance claims for its citizens.

UNUM claiming it was acting as a New York corporation (New York UNUM), had the case transferred to Kings Supreme on the possible lack of diversity grounds. Because of my suspension, a second attorney was engaged to litigate this matter in state court. UNUM re-argued the *Shaw Case*, and both the Lower Court and the Appellate Division

dismissed the case on the basis of Statute of Limitations. No Lower Court or Appellate Division judge was aware of New York's Abandoned Property Law § 700; no judge or law clerk questioned why the insured's death did not automatically trigger a stakeholder status for the insurance company on behalf of the beneficiary; no Court ever attempted to find a statute which specifically bars life insurance claims on the basis of statute of limitations. No judge or law clerk ever read the Lower Court file which contained my letter outlining all of the above. Nor did anyone at the appellate division level ever do the minimal research to discover the law or This Court opinion upholding it in *Connecticut Mut. Life Ins. Co. et al. v. Moore, Comptroller of the State of New York,* 333 US 541 (1948).

The above case is only one example of hundreds of cases that point to the paucity of judicial research and subsequent decision-making by patronage-appointed judges at the lower court level and the total lack of meaningful judicial review by the Appellate Division. I firmly believe that it necessitates This Court, as the highest court of this land, to examine whether the courts of King County, New York are too often derelict in

their duty to provide the parties their respective right to substantive and procedural due process.

The present case at bar is even more mystifying than the *Grunblatt* Case because I provided both the lower court and the Appellate Division with precise statements on all the case-law and clear genuine issues of fact as to my injuries, and this was readily apparent in all of my papers before the lower and appellate courts. How an appellate division can choose to arbitrarily ignore over one hundred years of their own case-law decisions in my case by citing two decisions, *Wit's End Giftique v. Ianniello*, 277 A.D.2d 684, 686, and *Mount Vernon Fire Ins. Co. v. Timm*, 237 A.D.2d 586, 587, where in both cases the judges dismissed the first motions not on the merits but for other reasons which were corrected. As no issues of fact remained and the second motions were granted in the interest of justice. In our case the matter was dismissed for timeliness, and issues of fact were never addressed. Granting summary judgment under these circumstances can only occur where I was arbitrarily denied any semblance of my rights to substantive and procedural due process.

The constitutional right to both substantive and procedural due process is guaranteed under both the 5th and 14th Amendment of our Constitution. It is axiomatic that a person's right to due process of law begins when a governmental agency essentially controls a citizen's outcome, either, for example, by stopping and detaining a person, followed by a search, arrest, indictment, conviction and sentencing in a criminal matter, or by judicial review of a civil complaint and/or petition. Substantive due process has also been referred to as a right guaranteed under the fundamental fairness doctrine. Thus, the constitution broadly outlines that we as citizens of these United States are guaranteed that any limitations to our personal and property rights will not be decided arbitrarily by a king or nobleman, but will be decided by our judiciary in accordance with the laws of our state and nation and will be fairly applied to all parties.

The fundamental right of citizens to due process of law, guaranteed under the Fifth (5th) Amendment and extended to state court proceedings, criminal and civil, by virtue of the Fourteenth (14th) Amendment, has essentially three components: a) substantive

due process; b) procedural due process; and c) evidentiary due process. We need not concern ourselves with c). In *Rochin v. People of California*, 342 US 165, this Court stated the following in its opinion, "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our people as to be ranked as fundamental or are implicit in the concept of ordered liberty". *Rochin*, at 169.

One need not cite the many criminal cases, i.e. *Mapp v. Ohio*, 367 U.S. 643, *Benton v. Maryland*, 395 U.S. 784, *United States v. Payner*, 447 US 727, and *Colorado v. Connelly*, 479, US 157, to name just a few, where This Court investigated possible serious shortcomings in the administration of justice by the courts or police, prison officials and other non-judicial officials. It is a given that any citizen is entitled to be treated fairly during the criminal process. What I am asking This Court is for a thorough review of the federal rights of citizens in a civil matter, as these rights relate to the state's judicial adherence to the principles of due process of law. As Chief Justice Roberts stated in his dissent on *Danforth v. Minnesota*, 128 S.Ct. 1029, it is "the province and duty" of this

Court "to say what the law is." State courts are the final arbiters of their own state law; this Court is the final arbiter of federal law.

My contention in the herein case is the total indifference by judicial officers to the fundamental fairness doctrine, and their abject refusal to even allow a first litigation to proceed to trial, which refusal was in direct contradiction to New York Law and Federal Law. The courts in this matter dismissed this case despite procedural rules that a second summary judgment motion bought by defendants was prohibited unless it met the proper criteria; *see, Rose v. La Joux,* 93 A.D.2d 817 (2nd Dept., 1983) *and Echeverri v. Flushing Hosp. & Med. Center,* 123 A.D.2d 818 (2nd Dept., 1986) and a host of similar cases[b], and even arguendo, if the motion had been proper, it was against all rules to grant summary judgment where genuine issues of material fact existed. All federal and New York State rules for granting summary judgment preclude a judge from judging the credibility of facts. See *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395 (1957).

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[b] see *Abramoff v. Federal Ins. Co.,* 48 A.D.2d 676 ; *Powell v. Trans-Auto Systems,* 32 A.D.2d 650; *Harding v. Buchele,* 59 A.D.2d 754: *Graney Dev. Corp. v. Taksen,* 62 A.D.2d 1148; *Marine Midland Bank v. Fisher,* 85 A.D.2d 905

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos,* 46 N.Y.2d 223, (1978). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. *Stone v. Goodson,* 8 N.Y.2d 8, (1960), and *Sillman v. Twentieth Century-Fox Film Corp., supra* .

The role of the court is to determine if bona fide issues of fact exist, and not to resolve issues of credibility. As the Appellate Division stated in *Knepka v. Tallman,* 278 A.D.2d 811 (4th Dept.2000): "Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint." Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present credibility issues for trial (see, *Schoen v. Rochester Gas & Elec.,* 242 A.D.2d 928;) Thus, no judge or Appellate Division had the right to arbitrarily create new rules and discount the facts to which I swore in constant affidavits, as well as facts brought forth by the doctors who testified to same in depositions and affidavits.

The New York court system has been a subject of intense review by This Court in a case known as *Torres v. Board of Elections*, 76 USLW 4052, 128 S.Ct. 791, which was decided on January 16, 2008. This Court upheld New York's selection of candidates for judicial elections as constitutional. Although this Court was aware that Brooklyn's democratic leadership has selected many questionable judicial candidates, nonetheless, the party violated no specific constitutional guarantees by these selections.

The New York State Bar Association Journal in its September, 2007 Issue focused on New York's judicial selection process. The article is titled *New York's Judicial Selection Process Is Fine – It's the Party System That Needs Fixing.* Pgs. 42-48. The article went on to note a general loss of confidence in the quality of state trial judges and the quality of justices. Id at 42. The article notes the federal district court's altering the election process by its decision in *Lopez Torres v. the New York State Board of Elections* 411 F.Supp.2d 212. This decision was affirmed by the Second Circuit 462 F.3d161. This Court overturned these decisions in 128 S.Ct. 791. As James Gardner, the author of the Journal article explains, although the judicial selection

system is broken, to be sure, its malfunction is only a symptom of much more deeply rooted problem: the dysfunction of New York's political parties and, in consequence the state's system of party democracy itself. The problem, he notes, is with the behavior of actors within the institution. The party officials who in practice run the judicial selection process have entirely the wrong incentives: they, the parties for whom they act, lack the slightest degree of accountability for undesirable behavior. Id. at 42-43.

This writ is not primarily concerned with the selection process of judges but with the inevitable outcome of these selections, namely the indifference and the incompetence of many members of New York's judiciary and their failure to adhere to New York's legislative and judicial law and to the Fundamental Fairness Doctrine. This non-adherence governed my case and I suspect governs too many other New York State judicial cases.

This case is a classic example of what occurs in the New York system through indifference and/or incompetence. Judge Michael Garson heard a motion for summary judgment on November 5, 2003. He issued a

judgment denying said motion as untimely. This motion was brought by defendants' first attorneys, Bartlett, McDonough, Bastone & Monagham. As soon as this motion was decided, they were fired by defendants and replaced by McAloon & Friedman.

As stated previously, defendants' new attorneys brought a second, almost identical summary judgment motion in February 2005, except that their motion contained seven hundred pages of exhibits rather than the three hundred pages brought by the prior attorneys. None of the Exhibits were cited by either attorneys in their supporting affidavits. I contended in my papers to the court that a second motion was illegal, yet Judge Garson granted the motion. As I explained to Judge Ruditsky in my motion to vacate said decision, this second motion is known as a "successive summary judgment motion and unless it met the stringent exceptions i.e., newly discovered evidence not previously available to defendants and a showing of why this evidence makes summary judgment the proper ruling, no second motion for summary judgment can be considered by the lower court. Defendants' motion contained none of the elements which would allow it to be considered. Unfortunately they

brought this motion before a judge who faced immediate removal from the bench for criminal indictments and, I suspect was totally unaware that he dismissed the prior motion. Judge Ruditsky never spoke to these glaring deficiencies when he upheld Judge Garson's decisions.

When my Case was appealed to the Appellate Division, the Court affirmed the ruling citing two cases which allow successive summary motions. The problem, as I clearly stated and explained in Point One of my Motion to the Court of Appeals, is, that both those cases were exceptions because in both cases the court's first decision essentially reserved judgment on the first motion pending additional information; and, when that information was forthcoming, the court then ruled that no issues of fact existed and thus granted summary judgment. In neither case was the first summary judgment motion dismissed on its merits.

Although I empathize with the lower court in trying to reduce its heavy case load, as well as with the Appellate Division, Second Department, which has more appeals before it than the other three departments combined, under the fifth and fourteenth amendment

every case deserves the minimal scrutiny required to ascertain whether there is any merit to the claims. No such scrutiny was afforded me in the case sub judice, and I was wholly denied due process, both procedurally and substantively.

The Appellate Division's comparison of this case to the two cases cited in the opinion is beyond comprehension as neither case cited by the Appellate Division meets the criteria of prohibited "Successive Summary Judgment Motions", while Plaintiff-Appellant's case is clearly on point with cases decided by all appellate courts which hold that successive summary judgment motions are improper.

Finally, where multiple disputed issues of fact existed, as was shown in Point Two of my Motion to the Court of Appeals, the Lower Court did not have the right to dismiss a case based on its determination of the credibility of Plaintiff or Defendant, as the determination of factual issues is a matter strictly reserved for the trier of fact.

The Second Department's failure to adhere to all New York's legal principles warrants the intervention of This Court as it essentially denies plaintiff any semblance of

substantive and procedural due process, in addition to violating my rights to fundamental fairness and due process of law, I firmly believe that this failure is the inevitable result of the selection process of judicial candidates, and that a state, such as New York, which has one of the finest field of potential judicial candidates, need not resort to the level of selection found only in profoundly corrupt third-world countries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Yaakov Kanovsky, Pro-Se

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No. 07-1533

IN THE

United States Supreme Court

YAAKOV KANOVSKY,

Petitioner,

v.

MONTEFIORE MEDICAL CENTER and
FRANK VEITH, M.D.,

Respondents.

On Petition For A Writ of Certiorari to the Supreme Court, Appellate Division Second Department of New York

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Timothy J. O'Shaughnessy
MCALOON & FRIEDMAN, P.C.
Attorneys for Respondents
123 William Street, 25th Floor
New York, New York 10038
(212) 732-8700

QUESTION PRESENTED

Was any right of plaintiff under the due process clause violated in the course of his action for medical malpractice in State Court?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents Montefiore Medical Center and Frank Veith, M.D., defendants in the medical malpractice action in the New York State Courts, respectfully submit this brief in opposition to the petition.

STATEMENT OF THE CASE

Petitioner brought an action for medical malpractice against respondents. Respondents moved for summary judgment and plaintiff opposed the motion and cross-moved. The trial court, which was the Supreme Court of the State of New York, County of Kings, granted respondent's motion for summary judgment and denied petitioner's cross-motion by order without opinion dated April 20, 2005. It is undisputed that petitioner failed to appear for oral argument on the return date.

Petitioner moved for an order vacating the order of April 20, 2005, which he claimed was based on his default in appearance on that date (Petition at 4a, 5a). That motion was denied (Petition at 3a-12a).

Petitioner appealed as of right to New York's intermediate appellate court, which is the Appellate Division of the Supreme Court, in this case the Appellate Division for the First Judicial Department. That court affirmed, pointing out that the

April 20, 2005 order was issued on the merits and not on default (Petition at 2a).

Petitioner moved in the New York Court of Appeals, which is New York's highest court, for leave to appeal to it. The motion was dismissed on the ground that the order sought to be reviewed did not finally determine the action (Petition at 14a). The Court so ruled because both the New York Constitution and the New York Civil Practice Law and Rules permit the Court of Appeals to grant leave to appeal in a civil case only if the order to be reviewed was the final order in the case. NY Const art VI, sec 3, cl b(6), *cf. id.* cl b(4); NY CPLR 5602(a)(1). The Court undoubtedly viewed the order granting respondents summary judgment to be the final order in the case, rather than the order denying petitioner's motion to vacate.

Petitioner moved in the Court of Appeals for reargument of his motion for leave to appeal but that motion was denied (Petition at 15a). Petitioner now seeks moves a writ of *certiorari*, arguing that his due process rights were violated.

REASONS FOR DENYING THE PETITION

Assuming without deciding that the award of summary judgment was a deprivation of some constitutionally-protected right of petitioner, petitioner had several adequate post-deprivation remedies. He could have appealed as of right from the order. NY CPLR 5701(a)(2)(iv) & (v). He could have moved for reargument before the same justice who

decided the motion. NY CPLR 2221(d). If he felt that he had evidence that he did not present in opposition to the motion, and that he had a reasonable excuse for not submitting the evidence on the motion, he could have moved for renewal. NY CPLR 2221(e). His motion for vacatur of the order probably is best understood as a motion for renewal.

Petitioner had the same post-deprivation remedies available to him when his motion for relief from the April 20, 2005 order was denied. After exercising his right to an appeal, but losing in the Appellate Division, petitioner also had available the remedy of a motion for permission to appeal to the Court to be made in the Appellate Division, but he did not avail himself of this possible avenue of relief. NY CPLR 5602(b)(1).

As to substantive due process, we respectfully submit that finding in the Supreme Court decision on the motion to vacate that petitioner had not shown merit to his action demonstrates that there was no substantive due process violation (Petition at 11a-12a).

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Timothy J. O'Shaughnessy
McALOON & FRIEDMAN, P.C.
Attorneys for Respondents
123 William Street, 25th Floor
New York, New York 10038
(212) 732-8700

Dated: New York, New York
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IN THE
SUPREME COURT OF THE UNITED STATES

YAAKOV KANOVSKY, ---- PETITIONER

MONTEFIORE MEDICAL CENTER and
FRANK VEITH, M.D. ---- RESPONDENTS

ON PETITION FOR A WRIT OF
CERTIORARI TO SUPREME COURT,
APPELLATE DIVISION, SECOND
DEPARTMENT NEW YORK

REPLY BRIEF

YAAKOV KANOVSKY

1138 52nd Street

Brooklyn, New York 11219

(718) 435-2847
Petitioner Pro Se

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PETITIONER'S REPLY BRIEF

Brief Summary

First, in their Brief in Opposition, Respondents present a "Statement of the Case" so replete with mistakes and omissions that it bears little resemblance to the actual facts. Respondents omit crucial details like the fact that their summary motion was successive, and that Petitioner demonstrated that he was present on the day of the hearing and did not "fail to appear" as they allege.

Next, Respondents follow up with a similarly misleading section titled "Reasons for Denying the Petition" making the specious argument that Petitioner failed to pursue "several adequate post-deprivation remedies". This is both untrue, as most of these so-called unavailed remedies were either attempted or entirely futile, and irrelevant, as the procedural history of this case demonstrates.

Finally, Respondents come to the peculiar and logically circular conclusion that because Petitioner's original motion to vacate was denied, *ipso facto*, there was no violation of substantive due process. The gross procedural and legal defects in that very order are what characterize the very violations to Petitioner's substantive due process.

Respondent's Statement of the Case

In their statement of the case, Respondents state (pg1) that they moved for summary judgment and were granted same. They fail to remind This Court that this was a second attempt to move for summary judgment which in itself was prohibited under New York Law, unless new evidence was presented in the second motion which was previously unavailable and unless such evidence warrants granting summary judgment. See *Rose v. La Joux,* 93 A.D.2d 817 (2nd Dept., 1983) *and Echeverri v. Flushing Hosp. & Med. Center,* 123 A.D.2d 818 (2nd Dept., 1986). Respondents' Motion lacked either element.

Respondents Brief further states (pg1) that "it is undisputed that petitioner failed to appear for oral argument". That statement is misleading as Petitioner has adequately demonstrated that he was present in courthouse for the oral argument but was misdirected by Judge Garson's own staff as to where to appear. Regardless, Petitioner's alleged failure to appear has no relevance to this matter. It is undisputed that all subsequent orders in this matter have considered Judge Garson's order to have been on the merits. Furthermore, Petitioner's Brief to the Appellate Division Second Department carefully reviewed all case law on successive summary judgment and conclusively pointed out that no judge had the discretionary power to grant Respondents' motion. Petitioner further pointed

out that even, arguendo, if a judge could entertain a second motion for summary judgment, he would be precluded by law from granting same where genuine issues of material facts existed, as was shown in all of Petitioner's motions.

Finally, Respondents posit that the New York Court of Appeals dismissed Petitioner's appeal because the appeal taken was not from a final order, and attempt to raise a distinction between Judge Garson's order of summary judgment and Judge Ruditsky's order denying Petitioner's Motion to Vacate. This is a distinction without a difference as both orders are final determinations in the case.

Respondent's "Reasons for Denying the Petition"

Respondents essentially make the argument that Petitioner did not adequately exhaust his post-deprivation remedies. As is well-demonstrated in the torturous history of this case, Petitioner has made all reasonable efforts to have the erroneous summary judgment order vacated except where such attempt would have been futile. Respondents argue that Petitioner should have moved for reargument to the "same justice" who decided the motion (pg.2). Such a motion would have been futile, as Respondents are well aware that Judge Garson was removed from the bench for criminal indictments a few days after he issued his order.

Respondents question why Petitioner did not bring a renewal motion to introduce new evidence not presented in his prior opposition. Petitioner moved to vacate because his evidence was not new, rather it had been presented and utterly ignored by Judge Garson.

Respondents, who construe the petition for a writ as merely a procedural motion, misunderstand the very nature of Petitioner's complaint before This Court. Petitioner's complaint before This Court is that both the lower court and the Appellate Division consciously disregarded the clear precise law governing both successive summary judgment and the judicial right to grant summary judgment. All of Petitioners papers spoke not only to a possible default order, but to the very merits of Petitioner's claim and the judicial response to same. No issue was left in doubt or unappealed. Thus, to suggest that Petitioner has additional remedies before either of those judicial bodies is disingenuous at best.

Reasons For Granting Petition

Both the original summary judgment order and the order denying the motion to vacate made gross errors of law and procedure. Respondents' main points in opposing Petitioner's initial Cross-Motion never included any case law or statute which permitted them to bring the summary judgment motion, but focused on denigrating the

expertise of Dr. Chaffiian, and denying that Dr. Friedland, a podiatric surgeon, could testify in this matter. Petitioner pointed out that the seminal cases by both the New York Court of Appeals in *Toth v. Community Hospital at Glen Cove, et al.*, 22 N.Y. 2d 255, and by the Second Department in *Ward v. Kovacs, 55 AD2d* 391, conclusively showed the following: a) an expert's affidavit of merit was unnecessary where the issues sworn to by Petitioner, i.e. the grotesque closing and shaping of the stump which caused Petitioner intense continuous pain and led directly to a second episode of gangrene, and the doctor's failure to investigate even after constant complaints by Petitioner, did not require expert testimony, as any lay person could understand the underlying negligence, and thus, Petitioner's sworn affidavits were sufficient in and of themselves; and b) a treating physician, even if he characterizes himself a non-expert, is fully qualified to testify as an expert at trial, and is certainly qualified for the lesser standard of defeating a summary judgment motion.

Finally, Respondents argue that the New York Supreme Court decision denying Petitioner's motion to vacate conclusively prove there was no violation of substantive due process. This argument is entirely circular, and utterly ignores the substance of Petitioner's writ. The order denying Petitioner's motion to vacate, like the order granting summary judgment, ignored well-settled

principles of New York law on successive summary judgment motions, and completely disregarded genuine, disputed issues of material fact which should have precluded any grant of summary judgment and mandated the vacatur sought.

CONCLUSION

Thus, for all the reasons stated in Petitioner's Writ, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Yaakov Kanovsky
Petitioner Pro-Se
1138 52nd Street
Brooklyn, New York 11219
(718) 435-2847

Dated: Brooklyn, New York
July 20, 2008